JD(SF)–63–04
Redding, California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

THE EARTHGRAINS COMPANY, INC., d/b/a
EARTHGRAINS REDDING FRENCH BAKERY
Employer

And 20-RC-17679

BAKERY, CONFECTIONARY & TOBACCO
WORKERS INTERNATIONAL UNION LOCAL 85,
AFL-CIO, CLC.
Petitioner

Kimberly F. Seten, Esq and Timothy Davis, Esq.
(Constangy, Brooks & Smith)
Kansas City, Missouri, for the Employer.

J. Felix De La Torre, Esq.
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Sacramento, California, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT
AND RECOMMENDATIONS ON OBJECTIONS

JOHN J. MCCARRICK, Administrative Law Judge. Pursuant to a Stipulated Election Agreement entered into by The Earthgrains Company, Inc., d/b/a Earthgrains Redding French Bakery (Employer) and Bakery, Confectionary & Tobacco Workers International Union, Local 85, AFL-CIO, CFC (Petitioner), an election by secret ballot was conducted under the direction of the Regional Director of Region 20 (Region) of the National Labor Relations Board (Board) on December 18, 2003, among the employees of the Employer in the following appropriate unit:

> All full-time and regular part-time production, sanitation, maintenance, shipping & receiving, and warehouse employees, and crew leader, employed by the Employer at its Redding, California plant; excluding all drivers, office clerical employees, management and administrative employees, guards and supervisors as defined in the Act.

The Region served a Tally of Ballots upon the parties following the election that showed the following results:

Approximate number of eligible voters	43
Number of void ballots	0
Number of votes cast for Petitioner	23
Number of votes cast against participating labor organization	17

Number of valid votes counted. 40
Number of challenged ballots[1]. 2
Valid votes counted plus challenged ballots. 42

On December 30, 2003, the Employer filed objections to the election.[2] Pursuant to the Regional Director's Report and Recommendations on Objections and Notice of Hearing, I conducted a hearing in Redding, California, on May 12 and 13, 2004. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

I. Findings of Fact and Discussion

The Employer filed Objection Nos. 1 through 5 and thereafter withdrew Objection Nos. 1 and 4. The remaining three objections are set forth below.

Objection No. 2

> At various times, since on or about December 2003, Petitioner, its employees, agents, and/or other individuals intentionally embarked on a campaign which sought to overstress and exacerbate racial and gender feelings by irrelevant, inflammatory appeals which had the effect of improperly clouding the election atmosphere in violation of the Act.

The evidence presented by the Employer that relates to this objection comes from employee Saeng Saechao (Saeng) and Fuey Saechao (Fuey). About one to two weeks before the election, the crew leader in production, Sou Pou Saelor (Saelor)[3], told Saeng, "White people don't like our people, we don't know when we going to be kick out." [sic] There is no evidence any other employees heard these comments or that Saeng repeated them to any other employee. At an unspecified time Fuey said that Saelor said to a group of employees in the break room "if you joined it (union), you get more pay." Saelor then said, "If somebody don't join in, you should remove your ancestor." While the Employer contends that this statement is a grievous insult to the Mien culture, there is no evidence to support this assertion and no explanation was offered for what this non sequitur meant. I give no weight to Fuey's testimony.

The Employer contends that Saelor's statements improperly appealed to race prejudice.

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[1] The challenged ballots are insufficient to affect the results of the election.

[2] December 29, 2003 was the due date to file objections. In the Report and Recommendations on Objections and Notice of Hearing, the Regional Director concluded that the Employer's Objections were timely filed because the Employer substantially complied with the Board's postmark rule. At the hearing Petitioner argued that the Objections were not timely filed. I find that I need not reach this issue in view of my findings, infra. Moreover, the issue of the timeliness of the objections has not been placed before me for hearing by theRegional Director in his Report and Recommendations on Objections.

[3] At the hearing the Employer argued that Saelor is a supervisor within the meaning of Section 2(11) of the Act. For the reasons, discussed, infra, it is not necessary to resolve this issue.

II. The Analysis

The Board has held that where racial prejudice is made the dominant theme of an election campaign, there will be grounds for setting the election aside.[4] However, where isolated remarks of a racial nature are made not rising to the level of a sustained inflammatory appeal, the election will not be overturned.[5]

The only credible evidence that Saelor made a racial remark is the statement that "white people don't like our people." The statement was made on one occasion to one employee who did not repeat Saelor's statement to any other employees. This was an isolated remark and did not rise to the level of a sustained inflammatory appeal. See *Brightview Care Ctr, supra*. I recommend that this objection be overruled.

Objection No. 3

At various times, since on or about December 2003, Petitioner, its employees, agents, and/or other individuals harassed and threatened employees if they refrained from engaging in Union activities as protected by Section 7 of the Act.

The evidence in support of this objection comes from three employees who worked in the production department Fuey, Saeng, and Nai Saechao (Nai).

Fuey's testimony was barely comprehensible. Fuey claimed that Saelor said, "Go to the union to have a meeting." Fuey was unable to give a time frame for this conversation, to state who was present, or where the conversation took place or to explain in what context the statement was made. I do not credit this testimony. Fuey also said, 40 days before the election at the slicing machine with two other employees present Saelor said, "that book, that power man is to make you suffer. He say that in 40 days you going to be happy or you're going to suffer." Again Fuey's statement is barely comprehensible. No further explanation was offered for what Fuey meant. I will also give no credit to this statement. Fuey also said that at some unspecified time before the election Saelor repeated that "you're going to be happy or you're going to suffer." After much leading by the Employer's counsel Fuey remembered other conversations with Saelor. Just before the election Fuey said Saelor told a group of employees,"We should join in, to vote in, otherwise we will be kicking out." Fuey clarified that Saelor said, " if you don't join in, you only work for one day to the next day, you don't know when you're going to be leaving." Fuey said Saelor told employees both 40 days before the election and just before the election that, "if you don't join in, you will not get enough work, hour (sic) to work." Finally, about a day before the election Fuey asked Saelor in the Employer's parking lot where the union meeting was and Saelor responded it was at a motel. In view of the non-responsive, vague and confusing nature of this witness' testimony, I will give no credit to Fuey's testimony.

In addition to Saeng's testimony in support of Objection 2, Saeng was told by Saelor at an unknown time at Saeng's machine "if you don't join in they might take us from work." When Saeng was asked who might take you from work he responded incomprehensibly, "He's talking about that raise don't like our raise." When I asked Saeng to clarify he said, "he was saying that we don't know when they're going to kick us out of job, whenever happened it happened." There was no explanation for who Saeng meant was going to kick us out of a job.

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[4] *Sewell Mfg. Co.*, 138 NLRB 66 (1962)

[5] *HCF, Inc.*, 321 NLRB 1320 (1996); *Brightview Care Ctr.*, 292 NLRB 352, 352-353 fn2 (1989)

Last Nai Saechao (Nai) stated that Saelor said two to three weeks before the election in the lunch room with three other employees present, "that once union come, if you join the union then they cannot, you know, kick you out of work." Saelor added, "if you joined the union you get enough hours to work, and if you not, you get less hours."

The Employer characterizes Saelor's statements as threats that if employees did not join the union they would be fired and not get enough hours of work.

In *Sutter Roseville Medical Center*, 324 NLRB 218 (1997), the Board held that pro-union conduct by a supervisor warrants setting an election aside when the employer takes no stand contrary to the supervisor's pro-union conduct, leading employees to believe the employer favors the union or if the supervisor's pro-union conduct coerces employees into supporting the union out of fear of retaliation by or rewards from the supervisor.

In *Stevenson Equipment Co*., 174 NLRB 865 (1969), the Board found that there must be a reasonable basis for believing that fear of supervisory retaliation destroyed employees' freedom of choice in an election before the election will be set aside. The Board said that maltreatment by a supervisor is unlikely where employees can bring the supervisory conduct to management who share the employees' views on unionization.

In the instant case, assuming Saelor is a supervisor, he is at most a low level supervisor. I have found he told employees that "once union come, if you join the union then they cannot, you know, kick you out of work." Saelor added, "if you joined the union you get enough hours to, work, and if you not, you get less hours." In addition Saelor said "we don't know when they're going to kick us out of job, whenever happened it happened."

Intially there is no question that the Employer herein conducted an anti-Union campaign. Thus, there is no issue that the employees would be confused that Saelor was speaking on behalf of the Employer when he made the statements attributed to him. Thus, this case does not fall within the first requirement in *Sutter-Roseville, supra*. The remaining issue is whether Saelor's statements are coercive and thus fall within the second category of pro-union supervisory conduct.

As noted above, if Saelor is a supervisor, he is a low level supervisor. Thus, he voted in the Board conducted election without challenge from the Employer. His position of crew leader is included in the unit description agreed to by the Employer. In the context of his comments, it does not appear that Saelor was speaking in his capacity as supervisor but was rather giving his personal opinion. As I have found, Saelor did not threaten retribution on any employee. Rather Saelor appears to be giving his opinion on job security if the Union won the election. He appears to be stating his opinion that with the Union, employees would have more hours of work and they could not be fired. There were no reprisals or promises of benefits attached to the statements I have attributed to Saelor. See *U.S. Family Care San Bernardino*, 313 NLRB 1176 (1994); *Sil-Base Co*., 290 NLRB 1179, 1181 (1988); *Turner's Express*, 189 NLRB 106 (1971). I recommend that this objection be overruled.

Objection No. 5

By these and other acts, Petitioner, its employees, agents, and/or other individuals Petitioner, its employees, agents, and/or other individuals interfered with the laboratory conditions for a fair election in the above captioned matter.

No evidence was adduced to support this objection and I recommend that it be overruled.

Conclusion

Based on the above, I recommend that the Employer's objections, in their entirety be overruled and that this matter be remanded to the Regional Director for appropriate action.[6]

Dated, August 5, 2004, San Francisco, California.

John J. McCarrick
Administrative Law Judge

[6] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.